85-650

NUMBER

Supreme Court, U.S.
FILED
OCT 7 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

JAMES B. McCORSTIN, JR., on his behalf and behalf of all others similarly situated,

PETITIONERS,

VERSUS

UNITED STATES STEEL CORPORATION,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JAMES B. McCORSTIN, JR., PRO SE
1108 50TH. STREET, WEST
BIRMINGHAM, ALABAMA 35208
(205) 785-8872

QUESTIONS PRESENTED FOR REVIEW

(I.) Whether a pro-se litigant may represent himself and all others similarly situated in an opt-in class action in an age discrimination case?

(II.) Whether the Court of Appeals for the Eleventh Circuit has rendered a decision sanctioning the action of the district court in denying amendments and dismissing the opt-in class action in this age discrimination case in conflict with the Court of Appeals for the Fifth Circuit which granted it, and calls for an exercise of this Court's power of supervision?

PARTIES TO THE PROCEEDING

1. JAMES B. McCORSTIN, JR., on his behalf and behalf of all others similarly situated. (1)

2. UNITED STATES STEEL CORPORATION (2)

---

(1) W. J. Barrett (deceased), Ruth Christian, Marshall T. Welch, O. V. Canant, Virginia Rogers, Joseph H. Narro, Joseph L. Johnson, Talmadge Taylor, P. J. Zukow, Willard F. Nelson, Robert M. Kirby, Carlton Neugent, John R. Bailey, R. E. Fortner, John R. Armstrong (deceased), Edmond Randle, Thomas H. Franklin, Brice B. Wigginton, W. R. Ling, W. H. Baxley, Mildred S. McCorstin, Clyde R. McBee, Helen B. McKinney, Cecil R. Norrell (deceased), John C. Pugh, Gilbert G. Ritchie, John E. Sadler, Clarence M. Sharp, George T. Storey, Davis H. Thompson, James E. Todd, Laverne R. Matthews.

(2) Subsidiaries of U.S. Steel: Bessemer and Lake Erie Railroad Company; Birmingham Southern Railroad Company; Carnegie Natural Gas Company; Duluth, Missabe and Iron Range Railway Company; Elgin, Joliet and Eastern Railway Company; Navios Corporation; Navios Ship Management Services, Inc.; Ohio Barge Line, Inc.; Percy Wilson Mortgage and Finance Corporation; The Pittsburgh & Conneut Dock Company; RMI Company; Quebec Cartier Mining Company; Union Railroad Company; United States Steel International, Inc.; USS Engineers and Consultants, Inc.; USS Great Lakes Fleet, Inc.; USS Great Lakes Fleet Services; USS Max Tech

Co., Inc.; USS Oilwell Supply Company, Inc.; USS Lake Transport, Inc.; USS Western Hemisphere, Inc.; U.S. Steel Credit Corporation; U.S. Steel Mining Co., Inc.; Warrior & Gulf Navigation Company; Emro Land Company; Marathon Finance Company; Deutsche Marathon Petroleum GmbH; Hancock Shipping Company, Limited; Marathon International Oil Company; Marathon International Petroleum (G.B.) Limited; Marathon International Petroleum Supply Company; Marathon Marine, Inc.; Marathon Oil Company; Marathon Oil North Sea (G.B.) Limited; Marathon Oil U.K., Ltd.; Marathon Petroleum Angola, Ltd.; Marathon Petroleum Australia, Ltd.; Marathon Petroleum Company; Marathon Petroleum Company (Norway); Marathon Petroleum Egypt, Ltd.; Marathon Petroleum Indonesia, Ltd.; Marathon Petroleum Ireland, Ltd.; Marathon Petroleum Kenya, Ltd.; Marathon Petroleum Libya, Ltd.; Marathon Petroleum Norte Brazil, Ltd.; Marathon Petroleum Syria, Ltd.; Marathon Petroleum Tunisia, Ltd.; Marathon Pipe Line Company; Pan Ocean Energy Company; Pan Ocean Oil Corporation (Abu Dhabi); USS Portfolio, Inc.

TABLE OF CONTENTS

	Page
Questions Presented for Review	1
List of Parties to the Proceeding	2
Table of Contents	4
Table of Authorities	5
Reference to Opinion Below	6
Statement of Jurisdiction	8
Statutes Involved	15
Statement of the Case	16
Argument	33

TABLE OF AUTHORITIES

	Page
Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc)	10,36
McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. 1980)	6,8,18,22, 31,33,35, 37,42,44
McCorstin v. United States Steel Corp., Appeal No. 79-3593 (5th Cir. unpublished 1980)	6,9,21,22, 31,35,36 37,42
McCorstin v. United States Steel Corp., Appeal No. 84-7422 (11th Cir. July 8, 1985)	7
Memphis Fire Department v. Carl W. Stotts, 52 LW 4767 (U.S. June 12, 1984), reversed 679 F.2d 541 (CA6 1982)	12,37,42
Statutes	
29 U.S.C. § 216(b)	11,13,15, 20,34,43
29 U.S.C. § 621 et seq	8,13,15, 17,19,20, 33,34,38

REFERENCE TO OPINIONS BELOW

This action involves opinions in two suits in the United States Court of Appeals for the Fifth Circuit and the opinion of the United States Court of Appeals for the Eleventh Circuit in the instant action. The opinions are as follows:

McCorstin v. United States Steel Corp., Appeal No. 79-3593 (5th Cir. unpublished June 10, 1980) AFFIRMED. The assigned file number in district court is CA 79M0535 S.

McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. July 16, 1980) REVERSED AND REMANDED. The assigned file number in district court is CA 74H100 S.

McCorstin v. United States Steel Corp., Appeal No. 79-3593 (5th Cir. unpublished September 5, 1980), motion for clarification GRANTED.

McCorstin v. United States Steel Corp., Appeal No. 84-7422 (11th Cir. unpublished 1985) AFFIRMED. The assigned file number in district court is CA 74 PT0100 S.

McCorstin v. United States Steel Corp., Appeal No. 84-7422 (11th Cir. unpublished 1985) suggestion for rehearing en banc DENIED July 8, 1985.

STATEMENT OF JURISDICTION

On January 31, 1974, James B. McCorstin, Jr. timely filed a class action suit in the United States District Court for the Northern District of Alabama. The defendant is the United States Steel Corporation. The assigned file number in the district court is CA 74H100 S. This suit involved a variety of claims under the Age Discrimination in Employment Act. After a directed verdict in favor of the defendant, McCorstin appealed to the United States Court of Appeals for the Fifth Circuit. (Case No. 78-1957)

On May 15, 1979, McCorstin, as the representative party on his behalf and behalf of 20 others similarly situated timely filed an opt-in class action suit in the United States District Court for the Northern District of Alabama. The defendant is the United States Steel Cor-

poration. The assigned file number in the district court is CA 79M0535 S. This suit involved a variety of claims, including willful and continuing violations of the Age Discrimination in Employment Act. On August 20, 1979, by way of a Memorandum Opinion, the district court entered summary judgment in favor of the defendant. McCorstin appealed to the United States Court of Appeals for the Fifth Circuit and under date of June 10, 1980, a panel of the court of appeals affirmed that ruling. (Case No. 79-3593)

On July 16, 1980, a panel of the United States Court of Appeals for the Fifth Circuit reversed and remanded Case No. 78-1957 for additional discovery and a jury trial.

McCorstin filed a motion for clarification on the rulings in Case No. 79-3593 and under date of September 5, 1980,

the United States Court of Appeals for the Fifth Circuit granted the motion ruling:

> "In affirming the summary judgment entered in CA 79M0535 S, we did not anticipate or know of the forthcoming reversal.
>
> Since it is now clear that the parties have been returned to the trial court for additional discovery and a jury trial, all claims should be resolved in that proceeding. Under these circumstances, we do not vacate our earlier rulings, but manifest justice requires a modification and clarification. Nothing contained in the rulings in this matter shall operate with prejudice against the appellant, McCorstin, as to any amendments he may propose to his pleadings in CA 74H100 S. Multiple suits are not necessary nor desirable."

The United States Court of Appeals for the Eleventh Circuit has established by its rulings in Bonner v. City of Prichard 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), that decisions of the former Fifth Circuit handed down prior to October 1, 1981 are binding precedent.

However, McCorstin has filed numerous motions to amend and/or consolidate

the two suits into one opt-in class action under section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 216(b) and the United States District Court for the Northern District of Alabama has denied the class action and dismissed all those similarly situated without a trial by jury.

On March 16, 1984, three days prior to trial, the trial court ordered that,

> "No evidence relating to layoffs, retirements, etc. of defendant's employees will be allowed except for the period 1968-1975."

The trial court, in direct conflict with rulings of the Fifth Circuit, denied McCorstin and all others similarly situated - right to trial by jury of all their claims, ignored the rulings by the Eleventh Circuit in Bonner, concealed evidence of criminal acts and violations of the Age Discrimination in Employment Act, intentionally omitted violations in its

instructions to the jury, and its actions have been so sanctioned by the Eleventh Circuit as to call for an exercise of this Court's power of supervision.

The United States District Court for the Northern District of Alabama denied McCorstin the right to present newly discovered evidence of a pattern and practice of discrimination held by this Court to be impermissible in Memphis Fire Department v. Carl W. Stotts, 52 LW 4767 (U.S. June 12, 1984), reversed 679 F.2d 541 (CA6 1982) and was sanctioned by the United States Court of Appeals for the Eleventh Circuit.

McCorstin and twenty-six others similarly situated, as of the date of the trial and having met all statutory prerequisites, had charges of additional violations of age discrimination against the United States Steel Corporation time-

ly filed with the Commissioner of the Equal Employment Opportunity Commission. The above and other charges, including consents to sue, were within the statute of limitations and were filed in the district court in this action, and are yet unresolved and the petitioner and all others similarly situated have been denied the right to trial by jury by the district court and so sanctioned by the United States Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit has effectively ruled that a pro se litigant does not have a right to represent himself and all others similarly situated in an age discrimination suit, in conflict with provisions of the Fair Labor Standards Act of 1938 and the Age Discrimination in Employment Act of 1967; and has thereby denied petitioner and all others similarly

situated the right to a fair trial by jury and this important question of law should be settled by this Honorable Court.

Petitioner invokes the jurisdiction of this Honorable Court pursuant to Rules 17.1(a) and 17.1(c) of the Rules of the Supreme Court of the United States.

STATUTES INVOLVED

FAIR LABOR STANDARDS ACT OF 1938, CHAPTER 8, TITLE 29 U.S.C. § 216(b)

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, CHAPTER 14, TITLE 29 U.S.C. §§ 623(a), (e), (f)(2), 626(b), (c), (d)(1), (e), 627, 630(a), (b), (f), 631(a)

(TEXT SET FORTH IN THE APPENDIX)

STATEMENT OF THE CASE

By letter of August 18, 1982, to some sixty-five Fairfield Works employees, Thomas S. Litras, General Manager-Personnel, responding for J. Bruce Johnston, Senior Vice President-Employee Relations, United States Steel Corporation stated:

> "We have not changed our policies and procedures as they concern Management Associates. We have consistently kept employees in this group working full time, even when they were called Management Trainees and classified as non-exempt. While you may not agree, it is vital to the continued health of U. S. Steel that we maintain our sources for future managers. Our experience has taught us that to do otherwise is a short-term expedient with negative long-term effects. We cannot repeat the mistakes of the past as they regard the recruitment and placement of new college graduates."

This newly discovered evidence of a policy and practice of age discrimination was obtained within the authorized discovery period by deposition of Phoebe D. Tindle.

The petitioner, James B. McCorstin,

Jr., was born February 24, 1920 and employed by United States Steel Corporation (hereinafter, "U.S. Steel") on July 15, 1947 as a nonexempt excluded employee. On January 31, 1972, McCorstin was forced into layoff, which was effectively a forced retirement. He was given over a month's gratuity pay and four weeks vacation pay through March 31, 1972.

On June 28, 1972, McCorstin filed a written notice of intent to sue with the Secretary of the United States Department of Labor (hereinafter, "Secretary") against U.S. Steel for willful violations of the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621, et seq.) (hereinafter, "ADEA" or "Act")

On August 28, 1972, McCorstin filed with the Secretary a charge of continuing and willful violation of the ADEA by U.S. Steel against its exempt and nonexempt excluded employees in the protected age

group.

On January 31, 1974, McCorstin timely filed a class action suit in the United States District Court for the Northern District of Alabama. The defendant is U.S. Steel. The assigned file number in the district court is CA 74H100 S. The suit involved a variety of claims of willful violations under the ADEA. The district court took jurisdiction and, prior to completion of discovery, dismissed the opt-in class action, intervenors and those that had filed a written consent to sue in the district court.

After a directed verdict in favor of the defendant, McCorstin appealed. On July 16, 1980, a panel of the United States Court of Appeals for the Fifth Circuit reversed and remanded for additional discovery and a jury trial, cited as McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. July 16, 1980)

(hereinafter, "McCorstin I").

On November 12, 1976, James B. McCorstin, Jr., W. J. Barrett, Ruth Christian, Marshall T. Welch, O. V. Canant, Virginia Rogers, Joseph H. Narro, Joseph L. Johnson, Talmadge Taylor, P. J. Zukow, Willard F. Nelson, Robert M. Kirby, Carlton Neugent, John R. Bailey, R. E. Fortner, John R. Armstrong, Edmond Randle, Thomas H. Franklin, Brice B. Wigginton, W. R. Ling and W. H. Baxley timely filed with the Secretary a notice pursuant to Title 29, Sec. 626(d) of intent to sue U.S. Steel as a class action and in the alternative, of intent to amend and/or intervene in the civil action presently pending. The Secretary attempted to resolve the matter through the conciliation process but was unsuccessful.

On May 15, 1979, McCorstin, as the

representative party on his behalf and behalf of all others similarly situated, timely filed in the United States District Court for the Northern District of Alabama an opt-in class action suit under Sec. 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 216(b) and the ADEA. The defendant is U.S. Steel. The assigned file number in district court is CA 79M0535 S. The suit involved a variety of claims, including continuing and willful violations of the ADEA. The district court took jurisdiction of the opt-in class action and on August 20, 1979, by way of a Memorandum Opinion, entered summary judgment in favor of the defendant. McCorstin appealed. The United States Court of Appeals for the Fifth Circuit took jurisdiction and under date of June 10, 1980, a panel of the court affirmed the decision.

McCorstin filed a motion for clarification. Under date of September 5, 1980, the motion was granted by the United States Court of Appeals for the Fifth Circuit ruling:

> "In affirming the summary judgment entered in CA 79M0535 S, we did not anticipate or know of the forthcoming reversal.
>
> Since it is now clear that the parties have been returned to the trial court for additional discovery and a jury trial, all claims should be resolved in that proceeding. Under these circumstances, we do not vacate our earlier rulings, but manifest justice requires a modification and clarification. Nothing contained in the rulings in this matter shall operate with prejudice against the appellant, McCorstin, as to any amendments he may propose to his pleadings in CA 74H100 S. Multiple suits are not necessary nor desirable." McCorstin v. United States Steel Corp., Appeal No. 79-3593 (5th Cir. Unpublished September 5, 1980) (hereinafter, "McCorstin II."

Numerous motions were filed in district court, since the two rulings by the Fifth Circuit, in an effort to amend "McCorstin I and/or consolidate McCorstin

II with McCorstin I into an opt-in class action so that all claims could be resolved in one proceeding as ordered by the Fifth Circuit in McCorstin II. The district court, in conflict with the rulings in McCorstin II, denied all motions to amend and/or consolidate the suits to allow the action to proceed as an opt-in class action. The district court dismissed all class members, even the twenty class members that jointly established jurisdiction with McCorstin for McCorstin II. James B. McCorstin, Jr. and the twenty other class members have been denied their statutory right to have their claims resolved in an opt-in class action in a trial by jury, and in conflict with rulings by the Fifth Circuit in McCorstin II.

During the authorized discovery period, computer generated lists of manage-

ment employees, which were used as work-sheets, were discovered. These lists were in chronological order by age, the oldest being first on the list. Age, service and total of the two were itemized and identified as points. These are the factors used in determining qualification for retirement. The names of retired employees had a line drawn through their names. Dates of retirements in the future were hand-inscribed beside the names of some of the employees.

The order authorizing the discovery deposition of Phoebe D. Tindle was filed and entered on April 27, 1983 and the deposition taken on May 17, 1983.

On January 3, 1984, McCorstin filed a motion for Judicial notice of McCorstin's class action charge of willful violation of the ADEA by U.S. Steel dated August 19, 1982, a letter of Sep-

tember 15, 1982 acknowledging receipt of the charge by the Equal Employment Opportunity Commission, and letter of November 23, 1982 advising that conciliation had been attempted with the respondent, and charging party is free to proceed in any manner deemed appropriate to protect his interests. McCorstin moved the court to take judicial notice and to order that the suit proceed as an opt-in class action.

On February 9, 1984, the June 1, 1982 affidavit of George Frank Jordan, District Director, Officer in Charge of the Birmingham District Office of the Equal Employment Opportunity Commission, was filed in the district court, which included eleven "notices" of intent to sue and "charges," and twenty-six consents to sue filed by McCorstin and others similarly situated against U.S. Steel

for violations of the ADEA.

On February 21, 1984, the district court overruled McCorstin's motion for judicial notice and motion to order the suit to proceed as an opt-in class action.

Petitioner filed motions for recusal of Judge Robert B. Propst on February 21, 1984 and March 1, 1984 and they were denied on February 24, 1984 and March 6, 1984, respectively.

On March 6, 1984, the United States Department of Labor moved to quash the subpoena issued to Lloyd L. Christopher, Area Director of the Birmingham Wage and Hour Office, and Lyndel L. Erwin, Assistant Area Director of the Birmingham Wage and Hour Office, and attached by certification the "notices of intent to sue" and "charges" filed with the Secretary by McCorstin and twenty others similarly

situated "To insure that these documents are such that Mr. McCorstin can enter them into evidence,..."

On March 8, 1984, the district court ordered that McCorstin, a pro se litigant,

> "...will be allowed not more than a total of 42 hours direct and redirect examination time including the time to call and administer the oath to witnesses and to identify and offer exhibits. It will be up to plaintiff to allocate this time as he sees fit. If he uses the total time before all of his witnesses are called, he will not be allowed to call additional witnesses."

On March 16, 1984, three days prior to trial, the district court ordered:

> "No evidence relating to layoffs, retirements, etc. of defendant's employees will be allowed except for the period 1968-1975."

This order is in conflict with rulings of July 16, 1980 and September 5, 1980 by the Fifth Circuit in McCorstin I and McCorstin II respectively, authorizing additional discovery and a jury trial.

The case went to trial on March 19, 1984 to a jury.

The trial judge directed the court clerk to use a stop watch to record the time used by the parties, mainly to restrict the time allowed the pro se litigant to present his case.

The trial judge refused to allow the plaintiff to interrogate his witnesses and introduce newly discovered evidence outside the restricted time frame of 1968-1975.

Lloyd L. Christopher was ordered not to testify about "notices" of intent to sue and "charges" of violations filed with the Secretary after 1975. The November 12, 1976 notice of intent to sue, timely filed by McCorstin and twenty others similarly situated, was not allowed to be introduced as evidence, nor were any of the other timely filed "notices" and "charges" filed after 1975.

The trial judge withheld the Man-Map Report No. 3155 Age Distribution for Active Exempt Employees (dated 06/18/80) as Court Exhibit 3. This computer generated list is evidence of willful and continuing violation of the ADEA concealed by the court.

The newly discovered evidence in the Thomas S. Litras letter was excluded by the March 16, 1984 order.

The trial judge would not allow the plaintiff to establish the fact that he was only one of a large group of employees forced into early retirement while the young management trainees/management associates were insulated from reduction in force in the difficult economic times.

The plaintiff's witnesses were not allowed to testify concerning the circumstances surrounding their retirements.

The trial judge refused to allow the

plaintiff to introduce critical circumstantial evidence that the defendant's counsel had an adverse ruling in a prior age discrimination suit that he was defending because the plaintiff was not shown to be the most inefficient supervisor, and McCorstin was subsequently listed as the "bottom man" in a group of forty-two supervisors. The trial judge would not allow the evidence to be marked or withheld as a court exhibit.

On March 28, 1984, the trial judge filed a self-serving memorandum for court file to justify the time restrictions placed on the pro se litigant.

On April 6, 1984, McCorstin filed objections to proposed jury instructions for failure of the court to give instructions that comprehended all of the violations of the ADEA that the plaintiff had timely filed with the Secretary in forms

of "notices of intent to sue" and "charges of violations of the Act," and for the biased and prejudicial manner of presentation.

The case went to the jury on April 6, 1984 and on April 9, 1984 the jury returned a verdict for the defendant.

On April 17, 1984, plaintiff filed a motion pursuant to Rule 59 FRCP for relief from judgment and to set the case for a new trial, with exhibits attached.

On May 15, 1984, by way of a memorandum opinion, the court overruled and denied plaintiff's motion for a new trial.

McCorstin filed notice of appeal on June 13, 1984, posted bond in the amount of TWO HUNDRED FIFTY DOLLARS ($250.00), and filed request that the complete record be prepared.

On August 8, 1984, McCorstin filed a

motion for the court to retain the record on appeal for use by the parties for preparing their briefs for the court of appeals. The motion was granted without objection on August 10, 1984.

A certificate of readiness was issued on August 13, 1984 and the certified record on appeal was mailed to the Clerk-United States Court of Appeals for the Eleventh Circuit on January 23, 1985.

On May 29, 1985, the United States Court of Appeals for the Eleventh Circuit affirmed.

On June 13, 1985, McCorstin filed a suggestion for rehearing en banc to resolve the conflicts of the prior rulings by the United States Court of Appeals for the Fifth Circuit in McCorstin I and McCorstin II with the rulings by the United States Court of Appeals for the Eleventh Circuit in the instant action.

McCorstin's suggestion for rehearing was denied by the court of appeals by Order of July 8, 1985.

The judgment of the court of appeals, dated July 24, 1985, affirmed the judgment of the district court.

ARGUMENT

Jurisdiction in the courts below in McCorstin I has never been denied; it has even been stipulated by the defendant and jurisdiction accepted in the Fifth Circuit as well as the Eleventh Circuit, and is the action being presented to this court at the present time. It was reversed and remanded for additional discovery and a jury trial by the Fifth Circuit on July 16, 1980.

On November 12, 1976, twenty-one similarly situated aggrieved persons, including McCorstin, all within the protected age group, timely filed with the Secretary an opt-in class action notice of intent to sue U.S. Steel for willful and continuing violations of the ADEA. No civil action was commenced until over 60 days after the notice of intent to sue was filed. The notice was filed within

180 days after the alleged unlawful practice occurred.

The Secretary received the notice, attempted to resolve the matters through conciliation and was unsuccessful. The claimants were so notified.

Within the statutes of limitation on May 15, 1979, McCorstin, a pro se litigant, as the representative party, on his behalf and behalf of all others similarly situated, filed an opt-in class action under Section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 216(b) and the ADEA. The district court took jurisdiction of the opt-in class action and on August 20, 1979, by way of a Memorandum Opinion, entered summary judgment in favor of the defendant. Jurisdiction was never questioned. McCorstin appealed to the United States Court of Appeals for the Fifth Circuit.

The circuit court took jurisdiction of the opt-in class action and under date of June 10, 1980 a panel of the court affirmed that ruling. There can be no doubt that the courts below took jurisdiction in McCorstin II and rendered rulings.

McCorstin filed a motion for clarification since McCorstin I was reversed and remanded on July 16, 1980.

The Fifth Circuit, without taking any exception to jurisdiction or otherwise, granted the motion on September 5, 1980 and specifically identified the title, "James B. McCorstin, Jr., on his behalf and behalf of all others similarly situated." There can be no doubt that the Fifth Circuit fully comprehended that this was an action brought by a pro se litigant, as the representative party, on his behalf and behalf of all others similarly situated. Their rulings are like-

wise perfectly clear. The ruling stated:

> "In affirming the summary judgment entered in CA 79M0535 S, we did not anticipate or know of the forthcoming reversal.
>
> Since it is now clear that the parties have been returned to the trial court for additional discovery and a jury trial, all claims should be resolved in that proceeding. Under these circumstances, we do not vacate our earlier rulings, but manifest justice requires a modification and clarification. Nothing contained in the rulings in this matter shall operate with prejudice against the appellant, McCorstin, as to any amendments he may propose to his pleadings in CA 74H100S. Multiple suits are not necessary nor desirable." McCorstin v. United States Steel Corp., Appeal No. 79-3593 (5th Cir. Unpublished September 5, 1980)

In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Taking direction from the above rulings by the Fifth Circuit and the Eleventh Circuit, McCorstin filed motions to

amend McCorstin I and/or consolidate McCorstin II with McCorstin I into an opt-in class action. McCorstin and the twenty other aggrieved persons that timely filed a notice of intent to sue have been denied due process of law. McCorstin and all others similarly situated have a statutory right to an opt-in class action and such right has been established by the rulings in McCorstin II.

What is "manifest justice" and what does "Multiple suits are not necessary nor desirable." mean?

The Thomas S. Litras letter of August 19, 1982, in the discovery deposition of Phoebe D. Tindle, makes it perfectly clear what the policies and procedures are at U.S. Steel, and McCorstin was denied the right to present this critical new evidence to the jury.

This Honorable Court in Memphis Fire

Department v. Carl W. Stotts, 52 LW 4767 (U.S. June 12, 1984), reversed 679 F.2d 541 (CA6 1982), ruled that it is discrimination to insulate a group of employees from reduction in force in periods of force reduction in times of economic downturn.

On January 30, 1984, McCorstin filed a motion for judicial notice to bring to the attention of the court: (1) the indisputable fact that he had timely filed a charge dated August 19, 1982 and date stamped "Received Aug 23 1982" by the Equal Employment Opportunity Commission that U.S. Steel continues to willfully practice unlawful discrimination in violation of the ADEA; (2) by letter of September 15, 1982, the Equal Employment Opportunity Commission acknowledged receipt of the charge; (3) by letter of Nov 23 1982 - discontinuance of processing by

the Equal Employment Opportunity Commission as they had engaged in conciliation, been unsuccessful in resolving the matter and that the requirements of Section 7(d) of the Act have been fulfilled and the Charging Party is, therefore, free to proceed in any manner deemed appropriate to protect his interests; and to move the court to order the case to proceed as an opt-in class action.

The August 19, 1982 charge against U.S. Steel stated:

"I. The above named employer continues to willfully practice unlawful discrimination in violation of the Age Discrimination in Employment Act. The employer employs more than 20 employees.

II. The named Respondent gave no position statement in regard to this matter.

III. I believe I have been discriminated against because of my age, 62 years, (date of birth: February 24, 1920), inasmuch as:

1. The employer has and contin-

ues to print notices seeking employment of young persons who are or will be college graduates, and actively recruits these persons to the exclusion of older college graduates. The employer continues to reduce pay and fringe benefits of older management employees and not young management associates in times of force reduction or shut down. The non-exempt excluded are forced into unemployment and/or retirement.

2. The employer has not actively advertised and recruited persons in the protected age group since or before June 12, 1968. It is my belief that this employer has employed young recent college graduates at the above location since it shut down on July 1, 1982, and have forced into retirement or unemployment many older, equally or higher degreed employees.

3. It is my belief that this employer has taken these actions in order to adversely affect the employees in the protected age group and to place the young management associates in positions held by, or could have been held by, the more qualified former employees.

IV. Based upon knowledge and belief, the above named employer willful-

ly violates the Age Discrimination in Employment Act in regard to all employees within the protected age group. I am filing this charge on behalf of all similarly situated persons as a class. I am identifying class as all exempt, and non-exempt excluded salaried employees and former employees of this employer, who at the time of alleged discrimination were at least 40 years of age but less than 70 years of age to date.

V. On 8/19/82 I went to the U.S. Steel employment office and was refused an application for employment, also ADEA Poster partly covered by Works notice."

The above charge, to this date, is a viable charge within the statute of limitations.

On February 21, 1984, the district court overruled the motion for judicial notice and to amend the suit to an opt-in class action.

McCorstin and all others similarly situated have, to this date, been denied a fair trial by jury in an opt-in class action.

The rulings by the United States Court of Appeals for the Eleventh Circuit are in direct conflict with the decisions of the United States Court of Appeals for the Fifth Circuit in McCorstin I and McCorstin II in denying McCorstin and all others similarly situated their statutory and case law right to have all their claims resolved in McCorstin I; and has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the district court, as to call for an exercise of this Court's power of supervision.

The district court has avoided the decision of this Court in the Memphis Fire Department case by refusing to allow McCorstin to present newly discovered evidence of a pattern and practice of age discrimination as established by

the Litras letter, and the Eleventh Circuit has so sanctioned the action of the district court, as to call for an exercise of this Court's power of supervision.

The United States Court of Appeals for the Eleventh Circuit, by its rulings, has decided that a pro se litigant may not represent himself and all others similarly situated in an age discrimination suit, and this is an important question of federal law which has not been, but should be, settled by this Court. Title 29 U.S.C. § 216(b) states in part:

> "...An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by <u>any one or more employees for and in behalf of himself or themselves and other employees similarly situated</u>...." (emphasis added)

CONCLUSION

Manifest justice requires that the decision of this Honorable Court shall be that James B. McCorstin, Jr., W. J. Barrett, Ruth Christian, Marshall T. Welch, O. V. Canant, Virginia Rogers, Joseph H. Narro, Joseph L. Johnson, Talmadge Taylor, P. J. Zukow, Willard F. Nelson, Robert M. Kirby, Carlton Neugent, John R. Bailey, R. E. Fortner, John R. Armstrong, Edmond Randle, Thomas H. Franklin, Brice B. Wigginton, W. R. Ling, and W. H. Baxley have met all prerequisites and they and all others similarly situated, by filing a written consent to sue in the district court, have a right to have all their claims resolved in an opt-in class action under provisions of the Fair Labor Standards Act and the Age Discrimination in Employment Act.

Regardless of whether this Honorable Court decides that a pro se litigant may

or may not represent himself and all others similarly situated, the Court should exercise its power of supervision and determine that all persons that have met all statutory prerequisites shall be entitled to an opt-in class action and have all their claims resolved in one suit. Multiple suits are not necessary nor desirable.

WHEREFORE, this Honorable Court should grant a writ of certiorari to review the decisions of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

JAMES B. McCORSTIN, JR., PRO SE
1108 50th Street, West
Birmingham, AL. 35208
(205) 785-8872